In re ABDUL GUNY ABDULLASA, DECD. FATIMA BEEBEE AMAL v. MOHAMED ABUBAKAR

[O.C.J. (Gordon Smith J.) April 21, 1936]
[Penang Originating Summons No. 59 of 1935]

Will — Charitable trusts.

A gift by a testator for the recital of prayers on certain specified dates in the names of certain specified Mohamedan saints held to be a good charitable gift as being one for the advancement of religion. Another gift for the recital of prayers in the names of each of the souls of the dead persons and also "Katam" in the name of each of the saints upheld as a valid charitable bequest in that being a trust created for the holding of a religious ceremony in honour and in the names of certain Mohamedan saints this was a trust for the advancement of religion.

Fatimah & Others v. *Logan,* 1 Kyshe 269; and *Aishabee & Others* v. *Mohamed Kassim & Others,* 4 Kyshe 212, differentiated.

ADJOURNED ORIGINATING SUMMONS.

K. S. Pillay for the plaintiff.

Raghavan for the defendant.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

Gordon Smith J.: This is an action commenced by the plaintiff by originating summons dated the 10th April, 1935, for construction of clauses 8, 17, 18 and 19 of the will of the abovenamed deceased, for administration of the [175] estate, for accounts and certain other reliefs and declarations.

The testator, who died on the 25th April, 1912, by his will dated the 24th day of May, 1908, appointed one K. M. Mohamed Eusoff to be the executor of his Penang property, and made lengthy provisions in regard to his estate both here and in India.

Probate of the will was granted on the 5th July, 1912 to the executor therein named and subsequently to this executor's death, administration with the will annexed was granted to the defendant, the present trustee, on the 2nd May, 1932.

During the course of the action representation orders were made and all persons interested are before the Court.

It is agreed that, subsequently, certain accounts will have to be taken before the Registrar and enquiries made by him, but one of the main purposes of the summons is to obtain the Court's construction of certain clauses of the will in order to ascertain the validity of certain trusts and bequests.

It is to be noted that by clause 8 of the will the income of the property thereby bequeathed is to be divided into three shares "one of which shall be set apart for the due performance of the yearly ceremony of my charity as set out herein below" and it is this particular one-third share that I am concerned with, for the moment.

Clause 13 of the will deals with the disposal of this one-third share and therefore I set it out in full as follows:—

"13. As mentioned in paragraph 8 hereof out of the one share set apart for my charity expenses, 12 marakals (gantangs) of boiled rice shall be purchased for the ceremony of reciting prayers in the name of the Saint Mohamed on the night of the 17th Rabialawal and 11 marakals of boiled rice for the ceremony of reciting prayers in the name of Katubul Aktabu Saidena Mohaideen Abdul Kader Jailanee on the night of the 17th Rabial-Akir and 10 marakals of boiled rice for the ceremony of reciting prayers in the name of Nagor Syed Hamid on the night of the 17th of Jamadil-Akir. The rice is to be cooked with ghee, flower, Sandalwood paste, rosewater, Indian joss sticks, etc. shall be purchased and prayers should be recited through Lebays, after this each Lebay shall be made to recite a prayer in the name of each of the souls of the dead person and Katam in the name of each of the Saints. In the end alms in money shall be given to the Lebays and to the poor and food (rice) shall be distributed to everyone present including the Lebays. For the first charity (ceremoney) about Rs. 15 shall be expended including the value of rice, etc. for the second charity about Rs. 13¼ shall be expended and for the third charity about Rs. 12½ shall be expended."

As will be seen, the testator himself divided this bequest of one-third share for the purpose of three charities and the details at the end of the clause about how much is to be expended on each one.

It is not altogether easy, however, to separate this clause into three distinct ceremonies or charities.

The first question, however, that has to be considered is whether the objects of the trust can or cannot be ascertained by the Court and then to see whether those objects are charitable or non-charitable.

It was submitted by counsel for the defendant beneficiaries that the directions as to the first charity or ceremony end with the words "and prayers shall be recited through Lebays." Following this imemdiately, comes presumably, the second charity or ceremony with the words "after . . . . in the name of each of the saints," and then finally the third charity or ceremony commencing with the words "in the end alms in money . . . . to every one present including the Lebays."

If I am correct in this division, it is permissible to separate what may or may not be charitable objects and to reject those that are non-charitable while upholding those which are charitable [*In re Clarke: Bracey* v. *Royal National Lifeboat Institution,* [1923] 2 Ch. 407].

Although there may be no definition of the word 'charity' in its popular sense, yet in its legal sense it comprises four principal divisions, namely:—

(*a*) trusts for the relief of poverty,
(*b*) trusts for the advancement of education,
(*c*) trusts for the advancement of religion, and
(*d*) trusts for other purposes beneficial to the community not falling under any of the preceding heads.

Trusts under the last heading are no less charitable in the eye of the law because incidentally they benefit the rich as well as the poor, and indeed, every charity that deserves the name must do either directly or indirectly. *Commissioners for Special Purposes of Income Tax* v. *Pemsel,* [1891] App. Cas. 531 at p. 583.

[176] Further, one might add that where there is an expressed charitable intention to be found in a will, as in this case, Courts will construe the will as liberally as possible so as to give effect to such intention and, if necessary, will apply the *cy près* doctrine.

Applying these principles to the first charity or ceremony one can, I think, uphold the trust as being one for the advancement of religion. It appears to be a trust for the recital of prayers on certain specified dates in the names of certain specified Mohamedan Saints. It is true that the recital of prayers does not necessarily involve the expenditure of money, but I understand that Lebays are a sort of professional class of prayer who receive remuneration for their services and whether or not the fact that rice is to be purchased and cooked in a special way is part of the ceremony seems to me beside the point, as it is to be distributed "in the end" to everybody present, both rich and poor, including the Lebays and also alms in money to the Lebays and poor.

Leaving out for the moment the second charity on which the testator directs about Rs. 13¼ to be expended, one can, I think, visualise the testator's intention as evidenced by his specific provisions as to the amount of money to be expended and that it is his intention that on each of the dates specified there shall be held a Mohamedan religious ceremony in honour of the Saints respectively mentioned, and in order to ensure the due and proper observance of such ceremony and the attendance of people thereat, he provides for other attractions in the way of money to be distributed to the poor and food to be served afterwards to all those attending.

As regards the second charity it was suggested before me that this was probably bad and not a charitable trust in that a trust created for the purpose of prayer for the souls of the dead could not be regarded as a trust for a charitable object but that the first and third charities were good and that the three were clearly distinguishable. The latter part of the clause appears to support this argument, but I do not really think this is so.

It is to be noted that there are three distinct Mohamedan Saints in respect of whom an individual religious ceremony is to be held on three separate and distinct dates (presumably some anniversary date), but the ceremony and the accompanying provisions as to food and gifts is to be the same in each case.

In my opinion there are not three separate charities but only one, but there are to be three ceremonies in respect of which the only distinguishing feature is to be the slight difference in the amount to be expended on the ceremony in honour of each Saint. In my opinion the whole clause deals with one and the same ceremony which is to be held on three different occasions.

As regards the direction —

"after this each Lebay shall be made to recite a prayer in the name of each of the souls of the dead person and Katam in the name of each of the Saints."

I regard this as merely an incidental part of the ceremony and I must confess that I am not sufficiently versed in Mohamedan religious observances to say exactly what it does mean. Anyhow, I do not think that it is sufficient to avoid the whole clause and intention of the testator.

In regard to this clause it was contended on behalf of the plaintiff that the ceremony enjoined was in the nature of a Malayan 'kandoorie' and that following the decisions in *Fatimah & others* v. *Logan*, 1 Kyshe 269, and *Aishabee & others* v. *Mohamed Kassim & others*, 4 Kyshe 212, therefore the trust was void. There is, I think, a clear distinction between the ceremony enjoined and 'kandoories', which are feasts in honour of a deceased attended by his relations and are held on the anniversary of the testator's death. Moreover, the deceased in the present case was not a Malay. The ceremonies envisaged are not in perpetuation of the name of the deceased nor are his relatives enjoined to attend, and although food is to be distributed at the conclusion it does not appear to me that the main object is of a festive nature.

I hold, therefore, that clause 13 of the will, being a trust created for the holding of a religious ceremony in honour of and in the name of certain Mohamedan Saints, is valid as a whole and that it creates a trust for a charitable object, namely, the advancement of religion.

The trustees are directed to expend sums not exceeding Rs. 15, Rs. 13¼ and Rs. 12½, in respect of the expenses of an annual religious ceremony of the nature described and in alms to the poor on each of the three respective occasions specified in the clause.

As to clause 14 of the will, the objects for which Rs. 30 are to be expended, clearly do not come within the term charity and I hold that this provision is void in consequence.

Similarly, in regard to clause 15, it might possibly be argued that an unascertainable part of the Rs. 4 bequeathed by this clause is good, but the main purpose of the ceremony is bad.

As to clause 16, the trust as to Rs. 50 to be distributed to the poor, is good, but as regards the remainder of the clause and the bequests to individuals, it must be the subject of inquiry before the Registrar as to whether these people [177] are alive. I understand that they are all dead. If any are alive then the trustee will, during the lifetime of the beneficiaries named, distribute the amounts to them accordingly. [177]

As to clause 17, the trust in respect of Rs. 75 is a good charitable object and is upheld, and as to the Rs. 60 the Registrar will enquire as to whether the school is now in existence. If not in existence, the trust fails.

Included in this clause is a trust for keeping a lamp burning in a mosque "Puthu Pallee" at Negapatam, and following the decision in Originating Summons No. 32 of 1931, I uphold this trust.

Included in this clause also is a direction to pay the balance of income remaining out of the one-third share (see clause 8) to five persons in equal shares. An enquiry will also be necessary as to the existence of these five persons. Those that are alive will have a life-interest in their respective one-fifth share of the balance of the one-third share and on death their respective shares will lapse. The contrary provisions at the end of clause 19 in this respect are void as offending against the perpetuity rule.

Clause 18 makes provisions for investment of the one-third charitable fund when the period of distribution arrives as has happened, if the remainder of his estate is sold before such distribution.

As stated, there must be further enquiry before the Registrar as to various matters and I understand that the distribution of the two-thirds of the estate to beneficiaries mentioned in clause 8 will necessitate realisation of the respective shares. A scheme should be prepared and submitted which will also include a scheme for realisation and investment of sufficient funds for the purpose of those charitable objects mentioned in the will which I have upheld.

As regards the amounts set aside for objects which I have held to be void or to have lapsed, these amounts will fall into the undisposed residue of the estate for the benefit of the next-of-kin and the enquiry envisaged will include ascertainment of the next-of-kin, accounts of the administration of the estate by the defendant, whether Jainamboo was divorced by the testator during his lifetime and other matters already referred to.

The costs of this application, as between solicitor and client on the higher scale will come out of the estate, and there will be liberty to apply.

Order accordingly.

Solicitors: *Sundram & Khoo; N. Raghavan.*

REX x. CHHUI YI

[C.C.A. (Whitley Ag. C.J., Mills and Adrian Clark JJ.)
April 26, 1936]
[Singapore Criminal Appeal No. 4 of 1936]

Criminal Law — Murder — Alibi — Trial — Summing-up — Comment by Judge on accused's failure to disclose defence at preliminary inquiry — Misdirection — Evidence — Onus of proof — Ordinance No. 53 (Evidence), s.105.

It is open to a trial Judge in a proper case to comment on the fact that the defence of *alibi* had not been disclosed on an earlier occasion.

Where a trial Judge in his summing-up observes that in failing to disclose at the conclusion of the preliminary inquiry names of witnesses whose evidence is likely to support his defence of *alibi*, an accused "cannot expect any help from the police because it is the duty of the police, if he gives the names of witnesses to see that those witnesses are made available for him."

Held: that such observation is not open to objection.

R. v. *Naylor*, (1933) 1 K.B. 685 distinguished.

It is the duty of the Crown to give evidence sufficient, if believed, to prove every ingredient of the offence of which they invite the jury to find the accused guilty but, once that onus is discharged, it remains for the accused to etsablish any facts which may show that what he did is, in his case and as an exception to the general law, not a criminal offence. There can be no legal obligation on the Crown, as a part of its case, to rebut, in advance, all possible grounds of defence.

CRIMINAL APPEAL.

The appellant was tried before Terrell J. and a special jury on a charge of murder and was convicted. He appealed against this conviction.

Taylour for the appellant.
Worley (Solicitor-General) for the Crown.

The questions propounded before the Court of Criminal Appeal (Whitley Ag. C.J., Mills and Adrian Clark JJ.) appear sufficiently from the judgment. The appeal at the conclusion of the hearing was dismissed. The Court intimated that it would reduce its grounds of decision into writing later.

The judgment of the Court was delivered by—

Whitley Ag. C.J.: In this case the Court, at the conclusion of the hearing, dismissed the appeal but announced that, certain of the questions of law raised by Mr. Taylour for the appellant being questions of some importance, the Court would record in writing its decisions in respect of those questions.

The first of these was that which was raised in the appellant's fifth ground of appeal, which reads as follows:—

"The learned Judge's summing up on the question of *alibi* amounted to a mis-direction inasmuch as it tended to suggest that the jury should disbelieve the witnesses [178] called [178] therein by the defence because the names of such witnesses were not disclosed at the preliminary enquiry."

In this connection Mr. Taylour cited to the Court a series of decisions of the Court of Criminal Appeal in England, namely, *R.* v. *Liddle* (in 21 Cr. A.R.); *R.* v. *Brown & Bruce*; *R.* v. *Rabbitt* and *R.* v. *Naylor* (in 23 Cr. A.R.) and *R.* v. *Parker* and *R.* v. *Littleboy* (in 24 Cr. A.R.).

Of these decisions that which, at first sight, is most nearly in favour of the appellant's contention in the present case is *R.* v. *Naylor*. In that case the Court of Criminal Appeal delivered judgment in a form which led the learned Editor of the Reports to summarise the decision, in his headnote, in words implying that it was improper for a trial Judge to make any adverse comments on a prisoner's failure to make any statement, when before the committing Magistrate, explaining where he was and what he was doing at the time of a housebreaking of which he declared himself to be not guilty, and that any such comments would lead to the conviction being quashed. A study of the case of *R.* v. *Naylor*, however, shows that the decision was given on the particular facts of that case and the particular form of the comments there made by the trial Judge. This was pointed out in the later case of *R.* v. *Littleboy* where Lord Hewart L.C.J. (who had also delivered the judgment of the Court in *Naylor's* case) at pp. 196-197 of the report says:—

"The real point urged on behalf of the appellant is that the Judge was wrong in making observations upon the fact that the defence of *alibi* had not been disclosed before the Magistrates, and our attention has been directed to *Naylor*, *supra*. It is important to observe that in that case the fact that the appellant had not disclosed his defence at an earlier date was employed as being evidence against him in corroboration of an alleged accomplice, who had given evidence for the prosecution. It is important to remember that the judgment in that case was given with reference to those facts. It is quite true that there are sentences to be found in the report of that judgment which appear to be of universal application. We do not think, however, that it was ever intended to lay down the proposition that a Judge may not in a proper case comment on the fact that the defence has not been disclosed on an earlier occasion. It is one thing to make an observation with regard to the force of an *alibi*, and to say that it is unfortunate that the defence was not set up at an earlier date so as to afford the opportunity of its being tested; it is another thing to employ that non-disclosure as evidence against an accused person and as corroborating the evidence of an accomplice."

Moreover in the case of *R.* v. *Moran*, (1909) 3 Cr. A.R. at p. 26 the Court took the view that a genuine *alibi* should be set up before the committing Magistrate and in *R.* v. *Rabbitt* (23 Cr. A.R. at p. 115) the Court stated that the fact that an *alibi* was not put in before the trial was "open to criticism."